

Kentucky Court Of Appeals
Cases of Note
[November-December, 2020](#)

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INSURANCE

CAMERON R. STONE BY NEXT FRIEND AND CO-CONSERVATOR, REGINA RAMAGE, ET AL VS KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY

[2019-CA-1739](#) 12/11/2020 2020 WL 7266229

Opinion by CLAYTON, DENISE G.; KRAMER, J. (CONCURS) AND MCNEILL, J. (CONCURS) This appeal was brought from an order granting summary judgment to Kentucky Farm Bureau Mutual Insurance Company (KFB). Appellants were the mother and the minor son of a woman who was killed in a car accident. They sought to recover loss of consortium damages under the underinsured motorist (UIM) provisions of a KFB automobile insurance policy, although the decedent’s claims were expressly excluded under the terms of the policy. The circuit court dismissed the mother’s claim as a matter of law because Kentucky does not recognize a claim for loss of consortium for an adult child. It further held that the son’s loss of consortium claim was excluded from coverage because it was derivative of the excluded primary wrongful death claim. The Court of Appeals affirmed, first holding that it was bound by the clear refusal of the Kentucky Supreme Court to create a loss of consortium claim for adult children and the absence of a statutorily-created claim. The Court then held that the son would not have a loss of consortium claim but for his mother’s claim, which was expressly excluded by the policy. An interpretation of the policy which gives a reasonable meaning to all its provisions supported the circuit court’s determination that the son’s derivative claim was excluded from UIM coverage.

NEGLIGENCE

KARIN J. STIENS VS BAUSCH & LOMB INCORPORATED

[2018-CA-1762](#) 12/11/2020 2020 WL 7266398

Opinion by JONES, ALLISON E.; DIXON, J. (CONCURS) AND MAZE, J. (CONCURS) Appellee B & L marketed a topical antibiotic, Besivance, for ophthalmological use. It was prescribed in appellant’s photorefractive keratectomy procedure (PRK). Following her surgery, she suffered irreparable damage to her left eye. Besivance has not been approved as a prophylactic by the Federal Food and Drug Act. However, doctors are permitted and encouraged to use medications off-label. B & L through its representative began discussing Besivance with appellant’s eye doctor. At this time, it had been used against pink eye and MRSA, but there were no clinical trials or articles regarding its use in refractive surgeries. The B & L representative told the eye doctor that Besivance could be used in an equivalent fashion to other antibiotics in refractive surgeries. B & L representatives were only to promote Besivance for its on-label purpose. Appellant’s eye doctor, relying on his own judgment, the B & L representative’s assurances, and the available literature, switched to Besivance for refractive eye surgeries. Following appellant’s eye surgery, she filed a complaint against B & L and her eye doctor. The

circuit court dismissed appellant's claims of strict liability and breach of warranty and ultimately granted summary judgment on her negligence claim. At issue on appeal was whether the circuit court erred when it granted summary judgment on appellant's negligence claim. The Court of Appeals focused on foreseeability, and what the tortfeasor knew or should have known at the time of the accident, contrasted with the circuit court's emphasis on a specific identifiable injury that could be causally connected to B & L's breach. The Court held that without a strict liability claim, which is founded in the essential common law elements, appellant could not claim a presumption-of-knowledge standard unless the product was sold in a defective condition unreasonably dangerous to the user. The Kentucky Products Liability Act imposes upon manufacturers a duty to test their products for risks that the medical community had a reasonable basis to suspect exist. However, Kentucky courts do not require manufacturers to lead scientific research into medical advances. The Court further noted that a manufacturer may also be held liable under a failure-to-warn theory if their product was known or suspected to be dangerous. However, B & L did not have any knowledge of reported risks or dangers associated with the use of their product. Appellant's eye doctor was one of the first to use Besivance in PRK surgeries. The Court held that summary judgment was properly granted.

WORKERS COMPENSATION

BOWLIN GROUP, LLC VS CHRISTINA REBENACK INDIVIDUALLY, ET AL [2018-CA-1494](#) 11/20/2020 2020 WL 6811652 DR Pending

Opinion by THOMPSON, KELLY; GOODWINE, J. (CONCURS) AND TAYLOR, J. (CONCURS) The widow of a worker fatally struck by an intoxicated driver's vehicle brought an action individually, as personal representative of the worker's estate, and on behalf of her minor children, against the driver and the club that served the driver. The worker's former employer intervened to assert subrogation rights. After the widow settled with the driver and club, the employer requested a credit against its future workers' compensation obligations. The circuit court granted the widow's motion for summary judgment, denying the request. The widow also filed bad faith claims against the club's excess insurance provider, but the circuit court granted the insurer's motion for summary judgment. The Court of Appeals held that the widow's settlement for an amount over twice the lost income claimed was prima facie evidence that some of such settlement was for lost income. However, as a matter of apparent first impression, the Court held that the employer was not entitled to a credit against future workers' compensation obligations from the settlement proceeds because KRS 342.700(1) provides that an employee's entire legal fees offset an employer's subrogation/future credit rights. Here, the widow's legal fees vastly exceeded the employer's obligations. Thus, its general entitlement to credits against its future obligations was "wiped out." The Court further held that summary judgment was premature on the widow's claims of bad faith.